

**TRANSMITTAL OF APPEAL BRIEF**Docket No.  
IDS-14502/14

In re Application of: Frank Venegas, Jr.

Application No. 09/779,782-Conf. #6741	Filing Date February 8, 2001	Examiner R. Canfield	Group Art Unit 3635
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Invention: BARRIER COVER

**TO THE COMMISSIONER OF PATENTS:**

Transmitted herewith is the Appeal Brief in this application, with respect to the Notice of Appeal  
filed: June 14, 2007.

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/John G. Posa/

John G. Posa

Attorney Reg. No. : 37,424

GIFFORD, KRASS, SPRINKLE, ANDERSON &  
CITKOWSKI, P.C.

2701 Troy Center Drive, Suite 330

Post Office Box 7021

Troy, Michigan 48007-7021

(734) 913-9300

Dated: August 14, 2007

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS AND INTERFERENCES**

In re application of: Venegas, Jr.

Serial No.: 09/779,782

Group No.: 3635

Filed: Feb. 8, 2001

Examiner: Robert Canfield

For: BARRIER COVER

**APPELLANT'S APPEAL BRIEF UNDER 37 CFR §41.37**

Mail Stop Appeal Brief  
Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

**I. Real Party in Interest**

The real party in interest in this case is Frank Venegas, Jr., Applicant and Appellant.

**II. Related Appeals and Interferences**

There are no appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**III. Status of Claims**

The present application was filed with 7 claims. Claim 1 was canceled, and claims 8-9 were added in November 2002. Claims 10-21 were added in October 2003. Claims 10 and 13 have been canceled, leaving pending claims 2-9, 11-12 and 14-21. Claim 19 is deemed allowable. Claims 2-9, 11, 12, and 14-18 are under appeal. Claims 8, 11 and 16 are the independent claims under appeal.

**IV. Status of Amendments Filed Subsequent  
Final Rejection**

An after-final amendment is filed herewith. As requested by the Examiner in the final Office Action, claims 2-7, 12, 14, 15, 17, 18, 20 and 21 required changes in their respective preambles. The

amendments made to these claims is reflected in the Appendix A, Claims on Appeal section of this Brief.

#### **V. Summary of Claimed Subject Matter**

Independent claim 8 is directed to a cover for a tubular metal guard rail of the type having two below-ground ends and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising a molded plastic article having rigid or semi-rigid opaque front and back panels spaced apart by six inches or more, each panel having a corresponding bottom edge; a semi-circular side panel connecting the front and back panels, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface; and wherein the front and back panels smoothly transition through the side panel without sharp edges. (Specification, page 3, lines 5-11; page 5, line 11 to page 6, line 8; Figures 1, 3).

Independent claim 11 is directed to a cover for a tubular metal guard rail of the type having two below-ground ends and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising a molded plastic article having rigid or semi-rigid front and back panels spaced apart by six inches or more, each panel having opposing bottom edges connected to a semi-circular upper portion corresponding to the semi-circular mid-section of the guard rail; a semi-circular side panel connecting the front and back panels, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface; and wherein at least one of the front and back panels includes an advertising display. [Specification, page 3, line 18 to page 4, line 7; page 5, lines 11-12; Figures 1-2 (item 10)].

Independent claim 16 is directed to a cover for a tubular metal guard rail of the type having an outer diameter, two below-ground ends, and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising spaced-apart, opaque, front and back panels, each having a flat bottom edge and a semi-circular upper portion; and wherein the semi-circular upper portions of the front and back panels smoothly transition through an integrally formed semi-circular side edge corresponding to the outer diameter of the tubular metal guard rail, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface. (Specification, page 3, lines 5-11; page 5, line 11 to page 6, line 8; Figures 1, 3)

**VI. Grounds of Rejection To Be Reviewed On Appeal**

- A. Claims 2-9, 11, 12, 14 and 15 stand rejected under 35 U.S.C. §112, first paragraph.
- B. Claims 2, 4, 8, 9, 11, 14-16 and 18 stand rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 3,307,282 to Caulkins.

**VII. Argument****A. 35 U.S.C. §112, First Paragraph Rejection**

Claims 2-9, 11, 12, 14 and 15 stand rejected under 35 U.S.C. §112, first paragraph on the grounds that “rigid or semi-rigid” is NEW MATTER. It is not. As the Examiner concedes, the specification *does* disclose the use of “structural plastic” which any person of skill in the art would recognize as being “rigid or semi-rigid.” After all, how could a plastic be structural if it were not “rigid or semi-rigid”? It could not be structural if it were flexible and limp.

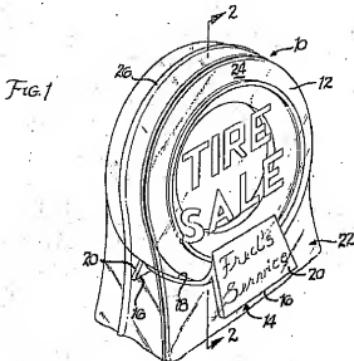
In support of Appellant’s interpretation, submitted herewith is one of many industry data sheets explaining how “... structural plastic is lighter, stronger, and often cheaper than wood, metal, concrete or conventional molded plastic.” “Because the strength is designed within the part itself, structural plastic parts are more rigid and durable than parts made of other materials.” The Board can take Official Notice that Appellants’ mention of “structural plastic” provides support for “rigid or semi-rigid.”

**B. Rejection of Claims 2, 4, 8, 9, 11, 14-16 and 18 under 35 U.S.C. §102(b)**

Claims 2, 4, 8, 9, 11, 14-16 and 18 stand rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 3,307,282 to Caulkins. Among other differences, Appellant’s cover apparatus is “rigid or semi-rigid.” The Examiner argues that “the plastic material of Caulkins is considered to meet the limitation of semi-rigid.” The cover of Caulkins is not “semi-rigid,” however; rather, the cover of Caulkins is made from a plastic “film” that would clearly fall into a heap but for the support of the tire which it is covering. Figure 1 of Caulkins is reproduced on the next page. As explained in the specification of Calkins, “[a]s clearly evident from FIGURE 1 both of the sheets of plastic film 24, constituting portions of the envelope 22, *drape or hang loosely down across one of the sidewalls of the*

*tire 12 ...*" (Emphasis added.)

Anticipation may be established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Systems, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). Moreover, anticipation requires the presence of all elements of a claimed invention as arranged in the claim, such that a disclosure "that 'almost' meets that standard does not 'anticipate'." Connell v. Sears, Roebuck Co., 722 F.2d 1542, 1548, 220 USPQ 193, 198 (Fed. Cir. 1983). A plastic film that "drapes or hangs loosely" cannot be considered "semi-rigid."



### Conclusion

In conclusion, for the arguments of record and the reasons set forth above, all pending claims of the subject application continue to be in condition for allowance and Appellant seeks the Board's concurrence at this time.

Respectfully submitted,

By:

John G. Posa, Reg. No. 37,424  
Gifford, Krass, Sprinkle, Anderson & Citkowski, P.C.  
PO Box 7021  
Troy, MI 48007-7021  
(734) 913-9300

Date: August 14, 2007

APPENDIX A

CLAIMS ON APPEAL

2. The cover of claim 8 wherein at least one of the front and back panels includes an advertising display.
3. The cover of claim 8 further including a fastener for securing the cover to the guard rail.
4. The cover of claim 2 wherein the advertising display is a message of stenciled letters.
5. The cover of claim 2 wherein the advertising display is an electrical/electronic circuit comprising one or more lighting elements configured to display a message or image.
6. The cover of claim 2 wherein the advertising display is one or more magnetically mounted objects of a ferro-magnetic material disposed on metallic surface.
7. The cover of claim 2 wherein the advertising display is hook-and-loop materials or a chalkboard surface.
8. A cover for a tubular metal guard rail of the type having two below-ground ends and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising:
  - a molded plastic article having rigid or semi-rigid opaque front and back panels spaced apart by six inches or more, each panel having a corresponding bottom edge;
  - a semi-circular side panel connecting the front and back panels, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface; and
  - wherein the front and back panels smoothly transition through the side panel without sharp edges.

9. The cover of claim 8, wherein the side panel has an outermost edge that is arc-shaped when viewing the front or back so as to correspond to the semi-circular mid-section of the guard rail.

11. A cover for a tubular metal guard rail of the type having two below-ground ends and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising:

a molded plastic article having rigid or semi-rigid front and back panels spaced apart by six inches or more, each panel having opposing bottom edges connected to a semi-circular upper portion corresponding to the semi-circular mid-section of the guard rail;

a semi-circular side panel connecting the front and back panels, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface; and

wherein at least one of the front and back panels includes an advertising display.

12. The cover of claim 11, further including a fastener for securing the cover to the guard rail.

14. The cover of claim 11, wherein at least one of the front and back panels is opaque.

15. The cover of claim 11, wherein the front and back panels smoothly transition through semi-circular side edges corresponding to the tubular metal guard rail.

16. A cover for a tubular metal guard rail of the type having an outer diameter, two below-ground ends, and a substantially semi-circular above-ground midsection connecting the two ends, the cover comprising:

spaced-apart, opaque, front and back panels, each having a flat bottom edge and a semi-circular upper portion; and

wherein the semi-circular upper portions of the front and back panels smoothly transition through an integrally formed semi-circular side edge corresponding to the outer diameter of the tubular metal guard rail, leaving a slot open at the bottom to receive the metal guard rail in slip-fit engagement such that the bottom edges are adjacent the ground surface.

17. The cover of claim 16, further including a fastener for securing the cover to the guard rail.

18. The cover of claim 16, wherein at least one of the front and back panels includes an advertising display.

**APPENDIX B**

**EVIDENCE**

None.

**APPENDIX C**

**RELATED PROCEEDINGS**

None.

800-335-5935

**STRONGER, LIGHTER, ECONOMICAL.**

CONTACT US

WHY STRUCTURAL PLASTICS

STRUCTURAL FOAM

STRUCTURAL WEB

STRUCTURAL PLASTICS AT WORK

CAPACITY &amp; OPERATIONS

DESIGN &amp; ENGINEERING ASSISTANCE

ABOUT FORT WAYNE PLASTICS



In the simplest possible terms, structural plastic is lighter, stronger and often cheaper than wood, metal, concrete or conventional injection-molded plastic. It is a more advanced material from which to mold your parts.



> Because the **strength** is designed within the part itself, structural plastic parts are **more rigid and durable** than parts made of other materials.

> Large parts can be produced as one strong, solid piece rather than as several pieces requiring assembly.

> Structural plastic **won't rust, rot, or corrode** and is resistant to chips or dents.

> Structural plastic can be **sawed, drilled, hammered and screwed** like any other material.

> The nearly **limitless design flexibility** of structural plastic allows your parts to be custom crafted precisely to your specifications.

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Structural plastic parts can be created via two different processes – structural foam and structural web.

> Structural foam is created in a manner similar to conventional injection molding except that a foaming agent is mixed into the polymer melt which expands to create a component of exceptional **strength and rigidity**.